No.

IN THE
# Supreme Court of the United States

ALL AMERICAN CHECK CASHING, INC., ET AL.,

*Petitioners*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

*Respondent*.

**On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

THEODORE B. OLSON
*Counsel of Record*
HELGI C. WALKER
JOSHUA S. LIPSHUTZ
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

*Counsel for Petitioners*

## QUESTIONS PRESENTED

The questions presented are:

1. Whether the structure of the Consumer Financial Protection Bureau violates the separation of powers.

2. Whether a successful separation-of-powers challenger who is subject to an enforcement action by an unconstitutionally structured agency is entitled to meaningful relief, such as dismissal of the action, due to the agency's constitutional defect.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The parties to the proceedings below were as follows:

Petitioners All American Check Cashing, Inc.; Mid-State Finance, Inc., d/b/a Thrifty Check Advance; and Michael E. Gray were defendants in the district court and appellants before the court of appeals.

Respondent Consumer Financial Protection Bureau was the plaintiff in the district court and appellee before the court of appeals.

2. Counsel for petitioners certifies that All American Check Cashing, Inc. and Mid-State Finance, Inc. d/b/a Thrifty Check Advance have no parent companies, and no publicly traded corporation owns 10% or more stock in either. Michael E. Gray is an individual.

## RULE 14.1(b)(iii) STATEMENT

Petitioners are aware of the following related cases:

- *CFPB* v. *All American Check Cashing, Inc.*, No. 3:16-cv-356-DPJ-JCG (S.D. Miss.);

- *CFPB* v. *All American Check Cashing, Inc.*, No. 18-60302 (5th Cir.).

Petitioners are unaware of any other directly related cases in this or any other Court, within the meaning of Rule 14.1(b)(iii). Petitioners do note, however, that similar issues as those raised in this petition are presented in *Seila Law LLC* v. *CFPB*, No. 19-7 (U.S.) (cert. pending), and *Collins* v. *Mnuchin*, No. 19-__ (U.S.) (cert. pending).

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## PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioners All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American") respectfully petition for a writ of certiorari before judgment to review a decision of the United States District Court for the Southern District of Mississippi. The decision of the District Court is currently pending in the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The district court's opinion, Pet. App. 8a-18a, order certifying the case for interlocutory appeal, Pet. App. 4a-7a, and the court of appeals' order certifying the case for interlocutory appeal, Pet. App. 1a-2a, are not reported.

## JURISDICTION

The district court issued its decision on March 21, 2018, and certified the case for interlocutory appeal on March 27, 2019. Pet. App. 7a, 18a. The Fifth Circuit accepted the appeal, Pet. App. 1a-2a, and docketed the appeal on April 24, 2018 as No. 18-60302. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2101(e).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced in the Appendix. Pet. App. 72a-77a.

## STATEMENT

All American respectfully requests that this Court exercise its authority and discretion under Supreme

Court Rule 11 to grant a writ of certiorari before judgment to the United States Court of Appeals for the Fifth Circuit, which has not yet rendered a decision in this pending appeal.

This case presents two exceptionally important questions: (1) Is the structure of the Consumer Financial Protection Bureau ("CFPB") constitutional in light of the statutory restrictions on the President's power to remove the Director, as well as other anomalous features of the agency; and (2) if not, what is the proper judicial remedy to redress that structural constitutional violation.

The importance of the question concerning the CFPB's constitutionality is beyond doubt. The Solicitor General recently recognized the need for this Court to resolve the validity of the CFPB's structure and urged the Court to take up that question in response to a pending petition for a writ of certiorari. *See* U.S. Br. 7, *Seila Law LLC* v. *CFPB*, No. 19-7 ("U.S. *Seila Law* Br."). This case presents that same question but, unlike *Seila Law*, indisputably involves the exercise of core executive power by the CFPB: the initiation of a federal court civil enforcement action against All American on the merits. Although the Fifth Circuit has not yet rendered a decision, there is nothing to be gained by waiting: The case for the constitutionality of the agency, pro and con, has already been exhaustively explored in the circuit courts in numerous thoughtful opinions, beginning with *PHH Corp.* v. *CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). *See*, *e.g.*, *CFPB* v. *Seila Law LLC*, 923 F.3d 680, 682 (9th Cir. 2019) (the arguments "have been thoroughly canvassed" and there is "no need to re-plow the same ground here").

This case also presents the equally important question of what remedy follows from a structural separation-of-powers violation. The CFPB now *acknowledges* that it has been unconstitutionally structured from the start, *see* U.S. *Seila Law* Br. 20, but it insists that, through a combination of severance of the removal restriction and "ratification" of its initial decision to file suit, the CFPB may escape any consequences in this case for that constitutional violation. While this enforcement action was pending, Mick Mulvaney, the Director of the Office of Management and Budget ("OMB"), was appointed Acting Director of the CFPB in November 2017. Asserting that he was removable at will by the President, Mulvaney purported to "ratify" the enforcement action against All American. The CFPB contended that this purported ratification deprived All American of *any* remedy for the now-conceded constitutional violation, and that All American—a defendant in a civil enforcement action brought by the CFPB—is not even entitled to raise the agency's unconstitutionality as a defense. Accepting that position would mean that even successful separation-of-powers challengers will receive no practical relief, and their matters will proceed *as if nothing ever happened*. But actions taken by unconstitutionally structured agencies are nullities and cannot be ratified.

The answer to the remedial question is an essential piece of the constitutional puzzle: It matters little if this Court declares the CFPB unconstitutional but prevailing challengers, such as All American, receive no meaningful relief in their case. A principal aim of the separation of powers is "to preserve individual freedom." *Morrison* v. *Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). If the separation of powers can

be evaded through an unconstitutional agency's maneuvering or judicial refusal to award relief to the successful challenger at bar, that structural guarantee will become meaningless, and injured parties will have no incentive to raise separation-of-powers challenges.

The law on separation-of-powers remedies, including in the context of restrictions on the President's removal authority, is deeply unsettled, with judges diverging wildly on this important issue. In the interest of judicial efficiency, the Court should resolve the remedial issue now to provide clarity on this important practical issue, together with the constitutional merits, rather than addressing the issues piecemeal. *See, e.g.*, *FOMB* v. *Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019) (granting separate petitions on separation-of-powers question and associated remedies question regarding *de facto* officer doctrine). The CFPB and the United States have "urged" the position, in this Court and before Congress, that it is in the government's "interests to obtain a final resolution" of the agency's constitutionality "as soon as possible." Letter from Kathleen L. Kraninger, Director, CFPB to Hon. Nancy Pelosi, Speaker of the U.S. House of Representatives at 2 (Sept. 17, 2019) ("Kraninger Ltr.").[1] It is equally in the public interest to address the proper remedy as soon as possible. If this Court declines to resolve the remedial question now, that will only create *more* uncertainty for courts, litigants, and other regulated parties as to what should happen, as a practical matter, in cases involving the CFPB. Each question presented here independently demands this Court's consideration and resolution now.

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[1] https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Pelosi-letter.pdf.

*Seila Law*, however, does not present the remedial question. The petitioner in *Seila Law* sought review only on the merits question of the CFPB's constitutionality, not on what remedies should apply for that structural violation, leaving out this key practical issue. Moreover, *Seila Law* does not present the issue of ratification, because it is factually disputed in that case whether the CFPB actually purported to ratify the action involving Seila Law. *See* U.S. *Seila Law* Br. 18-19 (noting that petitioner raised "factual objections to the Bureau's ratification argument below"). Thus, if this Court were to resolve the constitutional issue in *Seila Law*, it would not be able to reach the remedial issue or the question of ratification, if it so desired. Thus, even if the Court reversed the Ninth Circuit on the merits, that ruling would not be outcome determinative. Instead, on remand the CFPB would simply argue that this Court's decision makes no difference because the Ninth Circuit's decision was supported on the independent grounds of ratification. Without resolving the ratification issue, even a landmark decision may have no ultimate effect on the outcome in *Seila Law*.

By contrast, this case cleanly presents the remedial issues. All American petitions for review on the remedies question, and there are no factual disputes on whether there has been a purported ratification in this case. Pet. App. 25a-26a. The Court should therefore grant this petition for a writ of certiorari before judgment to consider the CFPB's constitutionality and the associated remedial question. At bare minimum, the Court should grant All American's petition alongside *Seila Law* as a companion case, which would eliminate all possible vehicle problems with that case and allow the Court to address the merits

and the equally important remedy questions simultaneously.

**1.** The CFPB is an unprecedented agency, combining sweeping unilateral executive, legislative, and judicial authority over a wide swath of the United States economy with unparalleled insulation from democratic accountability.

In 2010, Congress enacted the Consumer Financial Protection Act ("CFPA") as part of the Dodd-Frank Act. The CFPA established the CFPB as an "independent" agency responsible for overseeing 18 consumer-protection statutes previously administered by other agencies. *See* 12 U.S.C. §§ 5481(12), 5491(a), 5581. Additionally, the CFPB may bring enforcement actions for "unfair, deceptive, or abusive act[s] or practice[s]," *id.* § 5531(a); *see id.* § 5536(a), and "may prescribe rules" to define those terms, *id.* § 5531(b). The CFPB is headed by a single Director who serves a five-year term and may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(b), (c).

In addition to these broad powers, the Director may unilaterally request up to twelve percent of the Federal Reserve System's annual operating budget to the CFPB for its sole use, which "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *See* 12 U.S.C. § 5497(a). The President also has no input on the CFPB's funding, because the OMB lacks "any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.* § 5497(a)(4)(E).

**2.** For nearly two decades, All American, a company founded by Michael Gray, offered check-cashing and lending services in Mississippi, Louisiana, and

Alabama. Its business practices were heavily regulated by state law. *See*, *e.g.*, Miss. Code §§ 75-67-517, -519; La. Stat. § 9:3578.4; Ala. Code §§ 5-18A-12, -13. In 2014, Mississippi brought a regulatory enforcement action against All American. Two years later, the CFPB brought a parallel enforcement action against All American in the Southern District of Mississippi on the same grounds as the state enforcement action, for allegedly engaging in "unfair," "deceptive," and "abusive" acts and practices under 12 U.S.C. § 5531(a). *See* Pet. App. 44a. The state enforcement matter was settled on June 8, 2017, Pet. App. 31a, with All American paying $889,350 in fines and closing its Mississippi stores, Pet. App. 33a. Mr. Gray subsequently sold the rest of his business and no longer works in the financial-services industry. Nonetheless, the CFPB continues to pursue him.

All American moved for judgment on the pleadings, arguing that the CFPB's enforcement action was void because, among other reasons, the CFPB's structure violates the Constitution. While that motion was pending, the CFPB Director, Richard Cordray, resigned and the President appointed Mick Mulvaney as Acting Director under the Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq*. The CFPB then purported to "ratify" this enforcement action on the theory that Acting Director Mulvaney was removable at will by the President during his limited tenure as head of the CFPB, and that therefore his purported ratification "remedied any constitutional problem with the initiation of this case." Pet. App. 21a.

The district court denied All American's motion for judgment on the pleadings, adopting the reasoning of the D.C. Circuit's en banc majority in *PHH*, 881 F.3d 75, which upheld the CFPB's structure against a

constitutional challenge, Pet. App. 12a. All American then moved to certify the case for immediate appeal. The CFPB argued that the Acting Director's ratification mooted the constitutional question. Pet. App. 20a. All American responded that ratification of the unconstitutional agency's decision to bring this enforcement action was impossible. Dkt. 232. The District Court concluded that "the immediate appeal of this question will materially advance the ultimate termination of the litigation because the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." Pet. App. 6a. "A decision that the case cannot proceed at this time would avoid the anticipated two week jury trial, which, in turn, would prevent the parties' incurring addition litigation expenses and would prevent the expenditure of judicial resources." *Ibid.* The District Court accordingly certified the case for immediate review. Pet. App. 7a. The court then stayed all proceedings pending resolution of the constitutional question on appeal. Pet. App. 3a.

The Fifth Circuit accepted the appeal. Pet. App. 1a-2a. Before oral argument in the Fifth Circuit, the President nominated and the Senate confirmed a new Director of the CFPB, Kathleen Kraninger. A panel of the Fifth Circuit heard oral argument on March 12, 2019. The case remains pending. On September 17, 2019, Director Kraninger announced she had reevaluated the agency's position, and now agreed that the CFPB is unconstitutionally structured. Kraninger Ltr. 2. In informing Congress of her decision, she assured the Senate Majority Leader and the Speaker of the House that, despite the agency's admitted unconstitutionality, courts would simply sever the removal restriction, and pending actions would be otherwise unaffected. *Ibid.*

## REASONS FOR GRANTING THE PETITION

### I. THE QUESTIONS PRESENTED ARE OF THE UTMOST IMPORTANCE.

"The very essence of civil liberty … consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). And "where there is a legal right, there is also a legal remedy." *Ibid.* (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). The questions presented in this petition test these twin principles.

The first question concerning the CFPB's constitutionality is of the highest importance. The CFPB and the United States both agree that its structure flouts the very foundations of our constitutional order. U.S. *Seila Law* Br. 20. The agency exercises sweeping executive, legislative, and judicial authority over vast swaths of the National economy—yet it is entirely unaccountable to the American People. The Constitution requires that executive officers such as the head of the CFPB be removable at will by the President, and the CFPB fails to meet the few narrow and limited exceptions in this Court's precedents to the general rule requiring at-will removal. Finally, the CFPB's other structural features, together with the limitation on the President's removal power, combine to exacerbate its constitutional defects. The agency cannot be squared with the Constitution.

But the second question of remedies is equally important—if not more so. From day one, Mr. Gray, a small businessman who has already paid a heavy price in the related state proceedings, has had the boot of a blatantly unconstitutional federal agency on his

throat. The CFPB lacked the authority to exercise the awesome powers of the Executive Branch against petitioners because the agency is itself unconstitutionally designed. Yet the CFPB asserts that the removal restriction should simply be severed and its invalid acts ratified, thus insulating the agency from any consequences and depriving individual litigants like All American of any meaningful relief.

That approach cheapens the separation of powers. Just last Term, this Court made clear that remedies for separation-of-powers violations must advance both the "structural purposes" of our Constitution and "create incentives" to bring such challenges in the first place. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). If unconstitutional agencies are permitted to avoid the award of any meaningful relief for the party at bar, no "rational litigant" will bring structural constitutional challenges going forward. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014).

The question of what remedy flows from the CFPB's unconstitutional structure is of paramount importance to parties embroiled in CFPB enforcement actions and to lower courts that must resolve challenges to those actions. This Court should exercise its discretion under Supreme Court Rule 11 to grant certiorari before judgment.

### A. The CFPB's Structure Violates The Separation Of Powers.

**1.** The Constitution places the executive power of the United States in the hands of a single individual who is directly accountable to the people. *See Free En-*

*ter. Fund* v. *PCAOB*, 561 U.S. 477, 499 (2010) ("Constitution requires that a President chosen by the entire Nation oversee the execution of the laws"). Article II "vest[s]" "[t]he executive Power" "in a President" who alone has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. These provisions "make emphatically clear from start to finish" that the President is "personally responsible for his branch." Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005).

But the President cannot act alone. He depends on executive officers to help discharge his constitutional duties. So, to preserve the principle of accountability to the people for the faithful execution of the laws, the Constitution also requires that the President possess "unrestricted power of removal" over those officers. *Myers* v. *United States*, 272 U.S. 52, 176 (1926). This means that the President must possess the "importan[t]" power to "remov[e]" based even on "simple disagreement" over "policies or priorities." *Free Enter. Fund*, 561 U.S. at 492, 499, 502. This direct accountability is the only way "We the People" can ensure that "the Executive Branch, which now wields vast power and touches almost every aspect of daily life," does not "slip from the Executive's control, and thus from that of the people." *Id.* at 499.

For almost a century, this Court has recognized that officers of the United States who exercise executive authority must normally be removable at will by the President. The "landmark" decision of *Myers* firmly established the "general" rule on this matter: The Constitution grants the President "power to oversee executive officers through removal," and "the Leg-

islature has no right to diminish or modify" this "Presidential oversight." *Free Enter. Fund*, 561 U.S. at 492, 500.

A decade later, this Court established an exception to the "general" *Myers* rule. In *Humphrey's Executor* v. *United States*, the Court confronted a for-cause removal restriction insulating the five commissioners of the Federal Trade Commission ("FTC") from presidential influence. The FTC was established as a "nonpartisan" "body of experts" that was meant to act with "entire impartiality." 295 U.S. 602, 624 (1935). The Court held that the FTC may constitutionally be insulated from at-will removal by the President because it was a "quasi legislative and quasi judicial" multimember commission that exercises "no part of the executive power vested by the Constitution in the President." *Id*. at 628, 629. There is, however, a "field of doubt" between the *Myers* rule that executive officers are subject to the President's "unrestrictable," "exclusive[,] and illimitable power of removal," on the one hand, and the FTC on the other. *Id*. at 627, 632. The Court accordingly "le[ft] such cases as may fall within it for future consideration and determination as they may arise." *Id.* at 632.

In *Free Enterprise Fund*, this Court conducted the very "future consideration" that *Humphrey's Executor* contemplated. There, the Court struck down Congress's attempt to depart from the structure of traditional independent agencies led by a multi-member commission whose members are protected by a single level of for-cause removal. 561 U.S. at 483. The *Free Enterprise* Court declined to extend *Humphrey's Executor* to "a new situation" it had "not yet encountered." *Id*.

*Free Enterprise Fund* confirmed the rule that, when a court confronts a "novel structure," it must examine whether that structure results in a "diffusion of authority" that prevents "the President" from being "held fully accountable" to the people for the actions of the Executive Branch. 561 U.S. at 496, 514. Democratic accountability is the touchstone. "The people do not vote for the 'Officers of the United States.'" *Id*. at 497-98. Rather, they "look to the President to guide" those "subject to his superintendence." *Id.* at 498. Where novel acts of Congress diminish the ordinary "clear and effective chain of command," the public is stripped of the ability to place "blame" where it belongs, and such measures violate the separation of powers. *Ibid.* Under this test, Congress may not "immuni[ze] from Presidential oversight" the "regulator of first resort" over "a vital sector of our economy." *Id.* at 497, 508.

The CFPB—in which Congress granted sweeping rulemaking, enforcement, and adjudicative powers to a single individual who is removable by the President only for cause—is precisely such a "new situation" resulting in not just an "[un]clear" and "[in]effective chain of command," but *no accountability at all*. Because "[t]he people do not vote for" the CFPB's director, *Free Enter. Fund*, 561 U.S. at 483, 497, if the electorate objects to the way the Director wields these awesome powers, they have no recourse, because no democratically elected actor has any modicum of political influence over the agency. This Court should decline to extend *Humphrey's Executor*'s "limited" exception here, where, as in *Free Enterprise Fund*, the Court is faced with a "novel structure" that does not merely "add" to the independence of a multi-member commission, but rather "transforms" a single-member

agency head into the supreme leader of consumer finance in the United States. *Free Enter. Fund*, 561 U.S. at 496. Moreover, to the extent *Humphrey's Executor* could be read to authorize the CFPB's structure here, the decision is inconsistent with the Constitution's separation of powers and should be overruled.

If the CFPB's structure were upheld as constitutional, there would be no limiting principle on the range of executive authority that Congress could assign to a similarly structured agency. Congress would be free to make cabinet heads such as the Secretaries of Treasury, Labor, Commerce, Energy, Transportation, or the Interior removable only for cause. Equally, sustaining the CFPB's structure would mean that agencies such as the FTC, the Securities and Exchange Commission, the Federal Elections Commission, the Federal Communications Commission, and the National Labor Relations Board all could be headed by a single, partisan director who does not have to answer to the Executive. Indeed, Congress could divest the President of the power to execute a whole range of laws, from environmental to financial, and place that authority in the hands of a single unelected and democratically insulated Director.

This Court should strike down the novel structure of the CFPB, which wholly insulates the CFPB from political accountability.

**2.** The CFPB has additional features that render it even more clearly unconstitutional when combined with its single unaccountable Director.

In *Humphrey's Executor*, the Court allowed diminished presidential control in light of increased *congressional control*, as the FTC was to "report" to Congress and act "quasi legislatively" and "in aid of the

legislative power … as a legislative agency." 295 U.S. at 628. Here, by contrast, Congress eliminated *all* checks on the Director by abdicating its *own* core responsibilities over the CFPB. Whereas the FTC, like nearly all other administrative agencies, has always been subject to the appropriations process, the Director has sole authority to set the CFPB's budget and to demand more than half a billion dollars from the Federal Reserve System's operating expenses, 12 U.S.C. § 5497(a)(2)(A)[2]—a demand *exempt* from "review by [Congress's] Committees on Appropriations," *id.* § 5497(a)(2)(C).

Under the Constitution, however, Congress has the exclusive power of the purse, and "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). Congress's "power over the purse" is "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people" and provides a "bulwark" that is "particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). Indeed, "[t]he Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

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[2] CFPB, *Financial Report of the CFPB* 54 (Nov. 15, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf (over $600 million transferred from Federal Reserve to CFPB in 2017).

The Director's ability to requisition her own funds also limits her accountability to the President. "Lest it be forgotten, the Presentment Clause gives the President the power to veto" appropriations bills. *PHH*, 881 F.3d at 147 (Henderson, J., dissenting). The CFPB's independent funding mechanism thus frees it not only from "Congress's most effective means [of oversight] short of restructuring the agency," but also "from a powerful means of *Presidential* oversight." *Id.* at 138 (emphasis added).

There are, accordingly, no circumstances here that could justify encroaching on the President's removal power. *Free Enter. Fund*, 561 U.S. at 483-84. Unlike the FTC, the CFPB is free from the congressional appropriations process, is not "an agency of the legislative … department[]," and Congress is not its "master." *Humphrey's Ex'r*, 295 U.S. at 628. Quite the opposite, the CFPB combines vast authority for the Director with unprecedented insulation.

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The CFPB's structure violates the separation of powers.

### B. Successful Separation-of-Powers Challengers Are Entitled To Meaningful Relief.

Even though the CFPB now concedes that it has been unconstitutionally structured since inception, the CFPB nevertheless insists that any remedy for that violation has *no* effect whatsoever on pending enforcement actions. Instead, the CFPB asserts, courts should sever the removal restriction and, as here, the agency can purport to ratify its past invalid acts and continue on its way. *See* Kraninger Ltr. 3. The CFPB assumes that *no* litigant will receive *any* meaningful

remedy for actions the unconstitutional agency has taken in violation of the separation of powers. But that is incorrect. As the district court recognized, if the CFPB is unconstitutionally structured, "the case would not be able to proceed." Pet. App. 6a.

The question of remedy is just as important as the question of the CFPB's constitutionality, and requires this Court's immediate attention. What good is it for a party to prevail on a constitutional ground if doing so does not change the outcome of the court's judgment on the challenged action being reviewed? If Congress and executive agencies are permitted to violate the separation of powers with impunity, litigants will be deprived of any "incentives to raise" these challenges in the first place. *Lucia*, 138 S. Ct. at 2055 n.5; *see also* Barnett, *supra* at 518. Thus, when litigants timely and successfully challenge the actions of an unconstitutional entity, they are entitled to a judicial remedy that provides them real relief, especially where they have sought relief from past agency action, not merely prospective relief. Here, if All American is correct that the CFPB is unconstitutionally structured, that means that this enforcement action is void and All American's motion for judgment on the pleadings must be granted. *See FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (when a litigant raises a "constitutional challenge as a defense to an enforcement action," courts may not "declare the Commission's structure unconstitutional without providing relief to the [challengers] in th[at] case"). Otherwise, the court's opinion would be merely "advisory." *Teague* v. *Lane*, 489 U.S. 288, 315, 316 (1989) (plurality).

The question of remedy is a critical issue that independently warrants this Court's review.

**1.** The CFPB asserts that the Court should simply sever the removal provision, leaving the rest of the CFPA intact, and allow the agency to continue all of the unconstitutional actions that the invalid agency had initiated. But severance is not an adequate remedy.

As an initial matter, it is not clear that Article III of the Constitution allows courts to "strike" a provision from a statute. *See Murphy* v. *NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) ("Early American courts did not have a severability doctrine" because "[t]hey recognized that the judicial power is, fundamentally, the power to render judgments in individual cases."). Rather, "when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Id.* at 1486; *see also Collins* v. *Mnuchin*, --- F.3d ---, No. 17-20364, 2019 WL 4233612, at *41 (5th Cir. Sept. 6, 2019) (en banc) (Oldham, J., concurring in part and dissenting in part, joined by Ho, J.) (traditionally, Article III courts "decline to enforce" unconstitutional statutes and "enjoin their future enforcement").

But even under severance analysis, no severance would be warranted here: The Director's removal provision cannot be severed without inflating the President's power relative to Congress and transforming the CFPB into something Congress never would have created.

Severability turns on whether "the statute will function in a manner consistent with the intent of Congress," *Alaska Airlines Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted), and whether it will result in legislation that Congress "would not have enacted," *Murphy*, 138 S. Ct. at 1482. In *Free Enterprise*

*Fund*, for instance, the Court severed the removal provision only because it was able to conclude that "nothing in the statute's text or historical context" suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." 561 U.S. at 509.

Here, on the other hand, there is ample evidence that Congress never would have created an entity like the CFPB without insulating it from all democratic influence, in particular the influence of the President. Congress sought to create an agency "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority." 156 Cong. Rec. H5239 (2010) (Rep. Maloney); *see also PHH*, 881 F.3d at 162 (Henderson, J., dissenting) (listing numerous other examples from Dodd-Frank's legislative history). Accordingly, the U.S. Code defines the CFPB as "an independent bureau." 12 U.S.C. § 5491(a); *see also* 44 U.S.C. § 3502(5) ("independent regulatory agency"). "In other words, section 5491(a) ties the CFPB's very existence to its freedom from the President." *PHH*, 881 F.3d at 161 (Henderson, J., dissenting).

Moreover, Congress's willingness to insulate the agency from congressional control depended on insulating it from presidential control as well. There is no reason to think that Congress would have given up its own appropriations and oversight powers while granting the President *increased* power over 18 preexisting federal consumer-protection statutes. But that is exactly what severing the statute would do. In fact, most of those statutes were previously administered not by the President but exclusively by independent agencies like the Federal Reserve and the FTC, so sev-

ering would *increase* the President's authority well beyond the level it was at before the CFPB's creation. *See PHH*, 881 F.3d at 162 (Henderson, J., dissenting). "Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. Here, severing only the for-cause removal provision would fundamentally "alter[] the balance of powers between the Legislative and Executive Branches" in a manner that Congress never intended. *Ibid*.

Severing only the removal provision while leaving the CFPB independent from congressional appropriations and oversight—thereby dramatically expanding presidential power at the expense of Congress—"would have seemed exactly backwards" to Congress. *Murphy*, 138 S. Ct. at 1483. In *Murphy*, this Court declined to sever an unconstitutional provision that prevented states from authorizing private gambling from a provision banning states from running their own gambling operations. *Ibid.* These two "similar restrictions" "were obviously meant to work together," and Congress would not "have wanted the former to stand alone" because they were "meant to be deployed in tandem." *Ibid.* In the same way here, the "similar restrictions" on congressional and presidential oversight were meant to work "in tandem" to insulate the CFPB from any democratic influence. *See also Bowsher* v. *Synar*, 478 U.S. 714, 734-36 (1986) ("[S]triking the removal provision[] would lead to a statute that Congress would probably have refused to adopt."); *Carter* v. *Carter Coal Co*., 298 U.S. 238, 313 (1936) ("[T]o hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.").

Moreover, a severability clause is "not an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Such clauses typically are "little more than a mere formality," 2 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 44:8, at 627 (7th ed. 2009), and Dodd-Frank's boilerplate severance clause is no exception. It "[a]ppear[s] in the mega Dodd-Frank legislation 574 pages before" the removability clause and "says nothing specific about Title X, let alone the CFPB's independence, let alone for-cause removal, let alone the massive transfer of power inherent in deleting section 5491(c)(3), let alone whether the Congress would have endorsed that transfer of power even while subjecting the CFPB to the politics of Presidential control." *PHH*, 881 F.3d at 163 (Henderson, J, dissenting). While a severability clause creates a rebuttable "presumption" that Congress did not want the validity of an entire statute to depend on the constitutionality of each individual part, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). All of the provisions that make the Director unaccountable are central to the CFPB's structure. Picking and choosing which ones to keep would not fix an existing agency; it would create a new one.

But even assuming the removal provision was severable, that would only address the constitutional problem going forward. It would do *nothing* to ameliorate All American's past injury from being subject to an enforcement action initiated and prosecuted against it by an unconstitutional agency. That core injury requires judicial redress—grant of the motion for judgment, *i.e.*, dismissal of the action.

**2.** The CFPB further asserts in this and numerous other proceedings that ratification by the Acting Director alleviates all constitutional harm. But actions by an agency that is structured unconstitutionally—in contrast to defects in a particular officer-holder's title—are null and cannot be ratified. As this Court has held, "[a]n unconstitutional act is not a law"; rather, "it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby Cty.*, 118 U.S. 425, 442 (1886). Where the entity does not "legally exist[]," then "no validity can be attached" to its acts. *Id.* at 449. Thus, a lawful entity "[can]not ratify the acts of an unauthorized body." *Id.* at 451. "Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent's prior unauthorized acts." *CFPB* v. *RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018). But unlike an Appointments Clause challenge, All American has challenged "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *Ibid.*; *see also Newman* v. *Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) ("Ratification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start.").

*Lucia* also forecloses the CFPB's argument. There, the SEC issued a "ratification" while the case was pending, 138 S. Ct. at 2055 n.6, yet this Court reached the merits and ordered an appropriate remedy. Declining to address a serious structural constitutional challenge based on a purported ratification would provide no relief at all, let alone "appropriate" relief. *Ryder* v. *United States*, 515 U.S. 177, 183 (1995). Indeed, the CFPB's ratification theory ignores this Court's instruction that structural constitutional

remedies must "create incentives" for those challenges to be brought. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations omitted). Allowing ratification to "cure" the CFPB's structural constitutional deficiency would nullify the significant structural safeguards of liberty served by our Constitution's separation of powers and "would create a disincentive to raise" structural challenges. *Ryder*, 515 U.S. at 183.

Moreover, even if this action could be ratified, the Acting Director's purported ratification was ineffective because the CFPB cannot satisfy the independent requirement for ratification: "that the party ratifying" was able "to do the act ratified at the time the act was done." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994).[3] The CFPB "lack[ed] authority to bring this enforcement action" in the first place because it has been unconstitutionally structured from its inception. *NRA Political Victory Fund*, 6 F.3d at 822. Therefore, it did not have the power "to do the act ratified"—namely filing this enforcement action—"at the time th[at] act was done" on May 11, 2016, and so the Acting Director cannot ratify it now. *NRA Political Victory Fund*, 513 U.S. at 98.

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If the CFPB's position prevails, Mr. Gray, a defendant in a live enforcement action, and many others like him, could be denied any meaningful relief. The Court should grant certiorari here to uphold the fun-

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[3] All American raised additional arguments against ratification before the Fifth Circuit and the district court, including that ratification cannot moot that action, and that the statute of limitations prevented the CFPB from ratifying at the time it did. C.A. Br. 48-61; C.A. Reply Br. 19-30.

damental principle that for every right, there is a remedy, including liberty-protecting rights guaranteed by the separation of powers.

## II. THE QUESTIONS PRESENTED HAVE BEEN THOROUGHLY VETTED, YET CONFUSION REMAINS AMONG THE LOWER COURTS.

Certiorari is appropriate here because both questions presented have fully percolated in the lower courts, yet confusion and division remains. The questions are integrally connected and should be considered together by granting this petition.

**1.** As to the merits of the separation-of-powers claim, awaiting further decisions by the lower courts, including the Fifth Circuit here, is not necessary. As the Ninth Circuit put it in *Seila Law*, "[t]he arguments for and against that view have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp.* v. *CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). We see no need to re-plow the same ground here." 923 F.3d at 682. The district court in this case also simply adopted the majority position from *PHH* in denying All American's motion for judgment on the pleadings. Pet. App. 12a ("For the same reasons stated in *PHH Corp*., this Court rejects the arguments raised by Defendants, and likewise finds that the Bureau is not unconstitutional based on its single-director structure."). In *RD Legal Funding*, 332 F. Supp. 3d at 784, the Southern District of New York struck down the CFPB, simply "disagree[ing] with the holding of the *en banc* court and instead adopt[ing] Sections I-IV of Judge Brett Kavanaugh's dissent." The Fifth Circuit's recent en banc decision as to the Federal Housing Finance Agency—which is structured identically to the CFPB—also adopted the analysis of the *PHH* dissenting opinions. *Collins*,

2019 WL 4233612, at *22 ("reinstat[ing]" the panel decision); *see* 896 F.3d 640, 659 (5th Cir. 2018) (panel opinion) (adopting *PHH* dissenting views). The issue of the CFPB's constitutionality has been fully ventilated, both pro and con, and there is nothing to be gained by waiting for another opinion in this case: This Court has a full record of analysis in the lower courts to inform its consideration of the issue.

**2.** The Court should also grant this petition to consider the interrelated remedial question together with the merits question. The Court recently reiterated that remedies for separation-of-powers violations must advance both the "structural purposes" of our Constitution and "create incentives" to bring such challenges in the first place. *Lucia*, 138 S. Ct. at 2055 n.5. But further guidance is needed because lower-court judges are in disarray as to *how* structural constitutional violations should be remedied.

For instance, in *PHH*, although Judges Henderson, Randolph, and then-Judge Kavanaugh all dissented on the merits and would have held the CFPB unconstitutional, Judge Henderson wrote at length as to why the for-cause removal provision could not simply be severed, 881 F.3d at 139 (Henderson, J., dissenting), while then-Judge Kavanaugh and Judge Randolph would have held that the correct remedy was to simply sever the offending provision, *see id.* 198-99 (Kavanaugh, J., joined by Randolph, J.). Other cases in the D.C. Circuit, meanwhile, have held that an unconstitutionally structured agency "lacks authority to bring [an] enforcement action because its composition violates the Constitution's separation of powers," and have refused to apply any doctrine that would have the court "declare the Commission's structure unconstitutional without providing relief to the

appellants in this case." *NRA Political Victory Fund*, 6 F.3d at 828.

Similarly, the U.S. District Court for the Southern District of New York struck down the CFPB as unconstitutional for the reasons articulated by then-Judge Kavanaugh's dissenting opinion in *PHH*. *RD Legal Funding*, 332 F. Supp. 3d at 784. But the district court agreed with Judge Henderson on severance, and thus held that the entire CFPA was unconstitutional. *Ibid.* Furthermore, in *RD Legal*, the CFPB also attempted to ratify its past actions through a notice of ratification. *Id.* at 784-85. But the court held that "the CFPB's Ratification does not address accurately the constitutional issue raised in this case," because despite the purported ratification, "the relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." *Id.* at 785.

Disagreement reigns among the judges of the Fifth Circuit as well. The en banc Fifth Circuit recently decided that the FHFA was unconstitutionally structured, for the same reasons that the CFPB's design is unconstitutional. *Collins*, 2019 WL 4233612, at *22 (Willett, J., joined by Jones, Smith, Owen, Elrod, Ho, Duncan, Engelhardt, Oldham, JJ.). But the judges that joined that opinion then splintered on remedy, with a different coalition of judges forming a majority to hold that violations of Article II involving "[r]estrictions on removal" do not result in the invalidation of past agency actions because such officials "exercise authority that is properly theirs." *Id.* at *27 (Haynes, J., joined by Stewart, C.J., Dennis, Owen, Southwick, Graves, Higginson, Costa, Duncan, JJ.). That same majority also held that the for-cause removal restriction over the FHFA's director could be severed. *Ibid.* Seven other judges, however, would

have held that the FHFA's past actions *had to be invalidated*. *Id.* at *54-55 (Willett, J. joined by Jones, Smith, Elrod, Ho, Engelhardt, and Oldham, JJ., dissenting in part). And two judges would have held that the for-cause removal provision cannot be severed, *id.* at *39-41 (Oldham, J., joined by Ho, J., concurring in part and dissenting in part). A petition from that case is pending before the Court.

Disunity is thus pervasive among the lower courts on how to redress structural constitutional violations. The Court should not wait further to resolve this confusion, but should take up the remedial question alongside the merits question so that both can be decided together. Indeed, if this Court declines to resolve the remedial question at this time, that will only create *more* uncertainty for courts, litigants, and other regulated parties as to what should happen, as a practical matter, in cases involving the CFPB. Many litigants may not be willing or able to continue to pursue the question of remedies in another round of costly litigation that may not produce any real relief.

## III. THIS CASE PRESENTS THE IDEAL VEHICLE TO RESOLVE THESE TWO SIGNIFICANT ISSUES.

Like *Seila Law*, this case involves the validity of the CFPB's structure. But unlike *Seila Law*, this case also presents the question of remedies and, in particular, whether an Acting Director can ratify actions taken by an unconstitutional agency and thereby deprive the victims of that invalid entity any relief.[4]

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[4] The challengers in *Collins* v. *Mnuchin* have filed a petition for certiorari regarding the proper remedy for an unconstitutional removal restriction in light of the en banc Fifth Circuit

On November 24, 2017, the President designated Mick Mulvaney to serve as the CFPB's Acting Director pursuant to the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d. Pet. App. 19a-20a. Over the next several months, Acting Director Mulvaney purported to ratify several agency actions taken while Director Richard Cordray governed the CFPB, including the CFPB's decision to bring this lawsuit. Pet. App. 26a. The CFPB argued below that the Acting Director was removable at will, and that his ratification therefore cured any constitutional problem with the case's initiation. Dkt. 231, at 2-3.

In response, All American explained in detail why the purported ratification was invalid. Dkt. 232, at 2-7. After this briefing, the district court denied All American's motion for judgment on the pleadings, but granted immediate appeal regarding the constitutionality of the CFPB's structure. Pet. App. 4a-7a. In that order, the district court implicitly refuted the CFPB's ratification arguments. As the district court concluded, immediate appeal was appropriate because "the immediate appeal of this question will materially advance the ultimate termination of the litigation." Pet. App. 6a. This is because "the case would not be

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holding the FHFA unconstitutional. *Collins* v. *Mnuchin*, No. 19-__. All American agrees that guidance is needed on this remedial issue, *id.* at 23-28, and that it is "independently certworthy," *id.* at 7 n.1. But *Collins* was brought under the Administrative Procedure Act, and the challengers argue that it provides an adequate and independent basis for setting aside the FHFA's action. *Id.* at 8, 29; *see* 5 U.S.C. § 706 (providing that when an "agency action" is "contrary to constitutional right," "the reviewing Court shall … set aside" that action). All American's case, on the other hand, presents the remedies question purely in the context of a motion for judgment with no statutory grounds for vacatur.

able to proceed in the event the CFPB is not a constitutionally authorized entity." *Ibid*. "A decision that the case cannot proceed at this time would avoid the anticipated two week jury trial, which, in turn, would prevent the parties' incurring addition litigation expenses and would prevent the expenditure of judicial resources." *Ibid*. In the face of the CFPB's ratification arguments, the district court still ruled that the case "would not be able to proceed" if All American is correct on the constitutional question. The ratification question is squarely presented here, as further evidenced by the fact that both sides briefed the issue extensively before the Fifth Circuit. *See* All American C.A. Br. 48-66; All American C.A. Reply Br. 19-33. Indeed, the CFPB's chief argument before the Fifth Circuit below is that "defendants are not entitled to judgment on the pleadings because an official who is removable at will ratified the complaint." CFPB C.A. Br. 11 (capitalization removed).

The ratification question is *not* presented in *Seila Law*, however. As here, the CFPB in *Seila Law* argued in the alternative that even if Seila Law were to prevail on the constitutional issue, it would not affect the merits because the Acting Director's ratification of the civil investigative demand ("CID") cured any defect stemming from the CFPB's unconstitutional structure. CFPB C.A. Br. 13, *CFPB* v. *Seila Law LLC*, 2018 WL 1511440 (9th Cir.). In fact, this was the CFPB's chief argument before the Ninth Circuit. *Ibid.* But neither the Ninth Circuit nor the U.S. District Court for the Central District of California addressed the ratification issue. Thus, even if this Court were to grant certiorari in *Seila Law* and reverse the Ninth Circuit in a landmark constitutional opinion, on remand the CFPB would simply argue that this Court's ruling had no effect on the Ninth Circuit's judgment,

because it was supported by the alternative grounds of ratification.

Moreover, this Court could not cleanly reach the ratification issue in *Seila Law* even if it wanted to address that question without the benefit of either lower court's consideration of the matter. Seila Law argued that there is no evidence that the Acting Director actually ratified the CID.[5] As the Solicitor General recognized, there was a "factual dispute about the Acting Director's ratification." U.S. *Seila Law* Br. 19. Thus, on remand a lower court would need to determine, as an evidentiary matter, whether the Acting Director actually purported to ratify the CID, and then must decide whether that ratification cured the constitutional defects stemming from the CFPB's defective structure.

As the Solicitor General details, there are other aspects of *Seila Law* that may present vehicle problems. The district court in *Seila Law* had held that the issuing of a CID may be an adjunct to Congress's investigative power, and therefore the removal restriction did not encroach on the President's power in that case. U.S. *Seila Law* Br. 18-19. The agency action at issue here, on the other hand, indisputably involves the exercise of core executive power: an enforcement proceeding to execute the laws of the United States. "[U]nilateral authority to bring law enforcement actions against private citizens" is "the core of

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[5] Oral Argument, *CFPB* v. *Seila Law LLC*, No. 17-56324, United States Court of Appeals for the Ninth Circuit, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014915 (at 10:35).

the executive power and the primary threat to individual liberty posed by executive power." *PHH*, 881 F.3d at 174 (Kavanaugh, J., dissenting).

Finally, petitioners in *Collins* point out that it is unclear whether the order enforcing a CID in *Seila Law* was a final appealable judgment. Pet. 20-22, No. 19-__. No jurisdictional problems are implicated here. The *Collins* petitioners also observe that *Seila Law* presents "the separation of powers issue" only in an "abstract way." *Id*. at 23. All American's case presents no such problem: Mr. Gray is staring down the barrel of a trial against the government if the motion for judgment is not granted. Pet. App. 3a. This petition presents the constitutional question starkly, directly, and in the most concrete of terms.

Granting certiorari here would allow the Court to address both the merits and the remedies, and thereby resolve the confusion on both issues that is roiling lower courts.[6]

## IV. ALTERNATIVELY, THE COURT SHOULD GRANT CERTIORARI HERE TO CONSIDER THIS CASE AS A COMPANION CASE TO *SEILA LAW*.

At minimum, the Court should grant All American's petition as a companion case to *Seila Law* in the event it grants that petition. This Court has repeatedly granted certiorari before judgment when, as here, a complementary companion case offers the op-

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[6] Moreover, it makes sense to consider the remedies question presented here the same Term as the Court is considering remedies questions in the context of other structural constitutional violations. *See Aurelius*, 139 S. Ct. 2735 (granting petition to review whether the *de facto* officer doctrine applies to violations of the Appointments Clause and the separation of powers).

portunity to decide all aspects of an important question of constitutional law. This case presents the same separation-of-powers question presented in *Seila Law*, a question of undeniable, fundamental national importance. But it also presents the equally important remedial question, which is not presented in *Seila Law*. The Court should grant both petitions in order to consider the merits and remedies questions together if the Court is not inclined to review All American's case alone.

This Court may grant certiorari before judgment "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11; *see also* 28 U.S.C. § 1254(1) (writ of certiorari may be granted "upon the petition of any party … before or after rendition of judgment"); 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment … may be made at any time before judgment."). That standard is satisfied when a case pending in a court of appeals is a valuable companion to another case that the Court has decided to review. And that is particularly true in cases like this one that involve significant constitutional challenges to governmental action.

For example, the Court granted certiorari before judgment in *United States* v. *Fanfan*, 542 U.S. 956 (2004), so that the Court could hear the case together with *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* presented a constitutional challenge to the federal sentencing guidelines, and *Fanfan* additionally presented the question whether the offending portions of the guidelines were severable. *See id*. at 267. Hearing the two cases together allowed the Court to resolve

both the constitutional and severability questions at the same time, rather than piecemeal. *See id*. at 229.

Similarly, the Court granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), to hear the case together with *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). While *Grutter* involved an equal-protection challenge to the admissions policy at University of Michigan's law school, *Gratz* involved a similar challenge to the University's policy for admitting undergraduates. *Gratz* thus allowed this Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." 539 U.S. at 260.

This has been the Court's consistent practice for more than half a century in significant cases. In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which involved the scope of the National Labor Relations Act, the Court also granted certiorari before judgment in a companion case that "present[ed] the question in better perspective." *Id*. at 16. In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Court granted certiorari before judgment in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), allowing it to hold that the desegregation requirements of the Fourteenth Amendment also applied to the District of Columbia under the Fifth Amendment. And in *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), the Court granted certiorari before judgment "by reason of the close relationship of the important question raised to the question presented in" *Porter* v. *Lee*, 328 U.S. 246 (1946).

This case is an ideal companion to *Seila Law*, and is essential to resolving both the CFPB's constitutionality and the remedial consequences of the CFPB's

constitutional defects—just as granting certiorari before judgment in *Fanfan* alongside *Booker* allowed the Court to address both the merits of the constitutional issue and "the remedial question" of severance, *Booker*, 543 U.S. at 263. Failure to resolve that question will mean that even a decision declaring the CFPB's structure unconstitutional may have no effect in the numerous pending cases raising the issue. Then, the Court would have to wait for another petition in the future—perhaps even a petition from *Seila Law* or this case—to decide whether its merits decision provides litigants any actual relief. The Court's statutory authority to grant certiorari before judgment exists precisely to avoid this sort of scenario.

## CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

THEODORE B. OLSON
*Counsel of Record*
HELGI C. WALKER
JOSHUA S. LIPSHUTZ
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

*Counsel for Petitioners*

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